U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-T- INC
APPEAL OF TEXAS SERVICE CENTER DECISION

DATE: JUNE 13, 2016

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an information consulting business, seeks to employ the Beneficiary as a software development engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition. The Director determined that the record did not establish that the offered position was a *bona fide* job offer or that the Petitioner had the ability to pay the proffered wage.

The matter is now before us on appeal.[1] The Petitioner submits additional evidence and states that it is "ready, able, and willing to employ the beneficiary in a bona fide full time, permanent position." It also maintains that it has the ability to pay the proffered wage to the Beneficiary in this case, as well as the proffered wages of the beneficiaries of the other employment-based petitions it has filed with U.S. Citizenship and Immigration Services (USCIS). Upon *de novo* review, we will dismiss the appeal.

I. BONA FIDE JOB OPPORTUNITY

A labor certification is valid only for the particular job opportunity, the beneficiary, and the stated geographical area of intended employment. 20 C.F.R. § 656.30(c). A petitioner must intend to employ a beneficiary according to the terms of the labor certification accompanying the visa petition. *See Matter of Izdebska*, 12 I&N Dec. 54, 55 (Reg'l Comm'r 1966) (upholding a visa petition denial where the petitioner did not intend to employ the beneficiary as a live-in domestic worker pursuant to the terms of the labor certification).

[1] We note that the record contains what the Petitioner indicates is an "amended" Form I-140, which it filed on August 28, 2015 (SRC 15 904 47651). A petition may not, however, be amended on appeal. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (AAO 1998) (holding that a petitioner may not make material changes to a petition that has already been filed in order to make an apparently deficient petition confirm to Service requirements). However, while we will not consider the Petitioner's amended petition, we will review all evidence submitted in support of the petition to determine its relevance to the present case.

For labor certification purposes, "employment" means "permanent, full-time work" and "employer" is an entity "that proposes to employ a full-time employee at a place within the United States. 20 C.F.R. § 656.3. The filing of a labor certification application establishes a priority date for an immigrant visa petition. 8 C.F.R. § 204.5(d). A petitioner must therefore establish that a job offer was realistic as of a petition's priority date and remained realistic until the beneficiary obtains lawful permanent residence. *Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977) (holding that a petition "seeks to establish that the employer is making a realistic job offer . . . at the time the petition is filed").

The visa petition in this case is supported by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), which the Petitioner filed with the U.S. Department of Labor (DOL) on May 3, 2013. It reflects that the Petitioner will employ the Beneficiary at its headquarters in Clearwater, Florida (Part H.l. and H.2.), with travel to "various unanticipated client sites nationally requiring relocation and travel to these sites involving short and long term assignments." (H.14.).

On November 25, 2014, the Director issued a request for evidence (RFE) to the Petitioner, informing it that he found the disparity between its 16 employees and the 85 employment-based visa petitions it had filed (as of the date of the RFE) to raise questions regarding its intent to employ the Beneficiary on a full-time, permanent basis. To establish the *bona fide* nature of the offered position, the Director asked the Petitioner for the location of the Beneficiary's intended employment, and copies of any contracts under which he would be employed, as well as evidence establishing that it would control the terms of the Beneficiary's employment in the offered position.

On April 24, 2015, the Director denied the visa petition, discounting the Petitioner's assertions regarding its inability to identify the Beneficiary's future work assignments. He concluded that, as the Petitioner had not submitted evidence establishing the specifics of the Beneficiary's future employment, it had not demonstrated its intent to employ the Beneficiary in the offered position, and, therefore, had not established the offered position as a *bona fide* job opportunity.

The Board of Alien Labor Certification Appeals considered the *bona fides* of job offers similar to the offered position in *Matter of Amsol, Inc.* (*Amsol*), 2008-INA-00112, 2009 WL 2869970 (BALCA Sept. 3, 2009). As in this case, the employer in *Amsol* sought to employ software engineers from its headquarters and other "unanticipated" client sites in the United States. *Amsol*, 2009 WL 2869970 at *3.

In *Amsol*, DOL stated its inability to determine whether the offered positions constituted full-time, permanent jobs because the record lacked evidence regarding the specific clients for whom the beneficiaries would work, their proposed lengths of employment, and the effect of terminations of client contracts on their status and compensation if no imminent re-assignments existed. *Id.* It requested additional evidence from the employer, including copies of contracts under which the foreign nationals would be employed. *Id.*

The employer in *Amsol* provided copies of client contracts under which the foreign nationals worked. *Id.* at *9. However, DOL denied the labor certification applications, finding that the contracts did not provide the addresses, job duties, or work schedules as requested. *Id.* In vacating DOL's decision, BALCA stated: "While the Employer has the burden of proving that the job opportunity is permanent and full-time, requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Id.*

Although the BALCA decision in *Amsol* does not bind us in this matter, we, nevertheless, take note of its reasoning, in light of the similar issues considered here.

As noted above, the Director's RFE in this case requested evidence similar to that sought by DOL in *Amsol*. In response, the Petitioner asserted its intention to employ the Beneficiary permanently in the offered position and stated that it would be in control of his employment at contracted employment sites. It maintained, however, that it could not provide the specific contracts under which the Beneficiary would be employed, as the nature of its business was to place IT professionals, as necessary, throughout the United States. To establish the nature of its business, the Petitioner submitted a copy of a July 11, 2013, "vendor letter," signed by Corporate Financial Services, statement indicates that the Beneficiary has been working at The "through as a Java developer since September 19, 2011, and that her employment may be extended. The Petitioner also provided a professional services agreement with signed by on August 1, 2013, and the Petitioner on August 6, 2013. The agreement is accompanied by an August 1, 2013, work order that indicates the Beneficiary will work at as a Java developer beginning in August 2013, extending for "[m]ultiple [y]ears." It also reflects that the Petitioner will be paid $40 per hour for the Beneficiary's services.

The Director, however, discounted the preceding evidence, finding it to relate to the Beneficiary's H-1B employment, and, therefore, that it did not establish a future job opportunity in which the Petitioner would employ the Beneficiary.

While, as discussed below, we agree with the Director that the above documentation does not establish a specific future job opportunity for the Beneficiary, we also that the Director need not have required the Petitioner, a business providing temporary IT support personnel to U.S. companies, to submit evidence establishing the Beneficiary's intended work location and the contracts under which she would be employed. As BALCA stated in *Amsol*, "requiring an employer to change the nature of its contracts and how it does business in order to meet a specific demand is not realistic." *Amsol*, 2009 WL 2869970 at *9. Moreover, as the Petitioner states on appeal, an immigrant visa petition represents an offer of future employment. USCIS regulations do not require the Beneficiary to be employed by the Petitioner prior to being awarded lawful permanent resident status. Therefore, we do not find the Petitioner's inability to produce contracts and details of the Beneficiary's proposed work assignments to reflect that it does not intend to employ him in the offered position.

However, the Petitioner cannot establish the offered position as a *bona fide* job opportunity based solely on its stated intent to employ the Beneficiary in the offered position once he obtains lawful permanent

resident status. It must provide evidence establishing the existence of a valid job offer as of the visa petition's priority date, i.e., it must prove that, at the time it filed the labor certification, it had contracts or existing projects on which the Beneficiary could have worked in the offered position. *Great Wall*, 16 I&N Dec. at 144.

In the present matter, the Petitioner has submitted a July 11, 2013, statement relating to the Beneficiary's employment with which indicates that the Beneficiary's employment at began on September 19, 2011, and was ongoing as of the date of the statement. However, the statement also reflects that the Beneficiary was placed at under a contract with As a result, its relevance to the present matter is unclear since the Petitioner has submitted no evidence that demonstrates it had a contractual agreement covering the Beneficiary's services with as of September 19, 2011. Accordingly, the statement from does not demonstrate that, at the time the Petitioner filed the labor certification, it had an existing contract under which it could have employed the Beneficiary in the offered position.

The professional services agreement between the Petitioner and and the work order accompanying it, also do not demonstrate that, as of the date on which it filed the labor certification, the Petitioner intended to employ the Beneficiary in the offered position. As noted by the Director, both the professional services agreement and work order were signed by the Petitioner on August 1, 2013, three months after the Petitioner's May 3, 2013, filing of the labor certification, and, therefore, cannot establish its intent as of the visa petition's priority date.

However, even if the personal services agreement and work order had been in place on May 3, 2013, they would not prove the existence of a contract under which the Beneficiary could have been employed in the offered position. Although the language of the agreement does not specifically state the type of employment to be performed by the contract employees provided by the Petitioner, the accompanying work order relating to the Beneficiary's employment at reflects that she will work as a Java developer, employment that does not impose the range of duties and responsibilities described by the Petitioner in Part H.11. of the labor certification. Moreover, the Beneficiary's H-1B employment contract with the Petitioner, which covers the time period July 25, 2013, to July 30, 2016, reflects that the Beneficiary will be paid at the rate of $60,000 per year, not the $97,500 proffered wage reflected in the labor certification. This significantly lower rate of pay is further evidence that the type of work performed by the Beneficiary for is not comparable to the offered position. We also note that the personal services agreement and work order do not reflect that the Petitioner will retain control over the Beneficiary's employment at and, thereby, remain her actual employer. As a result, the Beneficiary's work at is not established as employment with the Petitioner.

The Petitioner has submitted insufficient evidence to demonstrate that, at the time of the labor certification's filing, it had any existing or projected projects on which the Beneficiary could have worked in the offered position. Therefore, the record does not establish that, as of the date on which it filed the labor certification, the Petitioner intended to employ the Beneficiary in the offered position

on a permanent, full-time basis. Accordingly, we will affirm the Director's finding that the record does not establish the offered position as a *bona fide* job offer.

II. ABILITY TO PAY THE PROFFERED WAGE

The Director's denial of the visa petition was also based on his determination that the record did not contain sufficient evidence to establish the Petitioner's continuing ability to pay the Beneficiary the proffered wage as of the petition's May 3, 2013, priority date. For the reasons that follow, we will also affirm the Director's ability to pay determination.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the labor certification, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remains realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires a petitioner to demonstrate financial resources sufficient to pay a beneficiary's proffered wage, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In the present case, the priority date is May 3, 2013, and the proffered wage is $97,500 per year. Therefore, to establish its ability to pay the proffered wage, the Petitioner must establish that it had a continuing ability to pay the annual wage of $97,500 to the Beneficiary from the May 3, 2013, priority date onward.

On appeal, the record of proceeding contains the following evidence relating to the Petitioner's ability to pay the proffered wage as of the priority date: its 2013 Form 1120S, U.S. Income Tax Return for an S Corporation; a Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and other Returns, relating to the filing of its 2014 Form 1120S; its monthly bank statements for the periods January through July, and September and November 2014; a chart listing the six Form I-140 beneficiaries (including the Beneficiary) for whom it indicates it filed Forms I-140 as of the May 3, 2013, which also reports the proffered and actual wages for these individuals in 2013 and 2014; copies of 12 letters, dated April 14, 2015, in which it requests the

withdrawal of previously filed Form I-140 petitions; and a USCIS acknowledgement of its February 6, 2015, withdrawal of an additional Form I-140 petition. The record also contains copies of the Beneficiary's Forms W-2, Wage and Tax Statements, for 2013 and 2014; copies of the 2013 and 2014 Forms W-2 for the six beneficiaries listed in the previously noted chart; and earning statements for the Beneficiary and other of the Petitioner's employees from 2013 and 2014.

To determine a petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner was employing the beneficiary as of the date on which the labor certification was accepted for processing by DOL and whether it continues to do so. If the petitioner documents that it has employed the beneficiary at a salary equal to or greater than the proffered wage, that evidence may be considered *prima facie* proof of the petitioner's ability to pay pursuant to 8 C.F.R. § 204.5(g)(2). If the petitioner does not demonstrate that it employed and paid the beneficiary at an amount at least equal to the proffered wage during the required period, USCIS then examines the net income figure reflected on the petitioner's federal income tax returns, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011).[2] If the petitioner's net income during the required time period does not equal or exceed the proffered wage, or when added to any wages paid to the beneficiary does not equal or exceed the proffered wage, USCIS reviews the petitioner's net current assets.

In cases where neither a petitioner's net income nor its net current assets establish its ability to pay the proffered wage during the required period, USCIS may also consider the overall magnitude of its business activities. *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). In assessing the totality of a petitioner's circumstances, USCIS may look at such factors as the number of years it has been in business, its record of growth, the number of individuals it employs, abnormal business expenditures or losses, its reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence it deems relevant.

Where a petitioner has filed multiple Forms I-140 for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each. *See* 8 C.F.R. § 204.5(g)(2); *see also See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS adds together the proffered wages for each beneficiary for each year starting from the priority date of the petition being adjudicated, and analyzes the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered after the dates any beneficiary obtained lawful permanent residence, or after the date a Form I-140 petition was withdrawn, revoked, or denied without a pending appeal.

[2] Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. V. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang. v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); K.*C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In addition, USCIS will not require a petitioner to establish the ability to pay additional beneficiaries for any year that the beneficiary of the petition under consideration was paid the full proffered wage.

Here, the Beneficiary's Forms W-2 reflect that the Petitioner paid her less than the proffered wage in 2013 ($14,741.24) and 2014 ($58,611.03), and a review of USCIS databases finds that the Petitioner had multiple Form I-140 petitions pending during both years. Accordingly, to establish its ability to pay in this matter, the Petitioner must establish that in 2013 and 2014, it had the ability to pay not only the proffered wage of $97,500 to the Beneficiary but also the proffered wages of those beneficiaries for whom Form I-140 petitions were approved or pending in these years.

As previously indicated, the Petitioner has provided a chart that lists six Form I-140 beneficiaries (including the Beneficiary in this case) to whom, it believes, it has an obligation to pay the proffered wage, and, on the chart, indicates the proffered and actual wages for each individual. This chart, initially submitted in response to the Director's RFE, reflects that the Petitioner filed for two of the listed beneficiaries (including the Beneficiary) in 2013 and the remaining four in 2014. In support of its chart, the Petitioner has provided Forms I-797C, Notices of Action, and copies of Forms W-2 and earnings statements issued in 2013 and 2014.

However, the Petitioner's calculation of the number of beneficiaries for whom Form I-140 petitions were pending in 2013 and 2014 is not accurate. Although the listing it submitted in response to the Director's RFE reported that it had filed two Forms I-140 in 2013, USCIS databases reflect that the Petitioner filed nine petitions during the year.[3] Similarly, USCIS databases reflect that the Petitioner filed nine Forms I-140 (not including the Beneficiary) in 2014, not the four reported in its chart.[4]

While we note the Petitioner's 2015 withdrawals of 13 of the Forms I-140 it filed in 2013 and 2014, these withdrawals do not relieve it of its proffered wage obligations to these beneficiaries during 2013 and 2014, when the Forms I-140 filed on their behalf were still pending. Therefore, to establish its ability to pay in 2013, the Petitioner must demonstrate that it had the financial resources to cover the proffered wage of $97,500 to the Beneficiary and the proffered wages owed to the nine beneficiaries for whom it filed Form I-140 petitions that year. In 2014, the Petitioner's combined proffered wage obligation is considerably greater as USCIS records indicate that all of the Forms I-140 filed by the Petitioner in 2013 remained pending in 2014. Accordingly, the total number of approved or pending Form I-140 petitions in 2014 was 19 (including the Beneficiary). To establish its ability to pay the proffered wage in 2014, the Petitioner must, therefore, demonstrate that it was not only able to pay the proffered wage to the Beneficiary, but also the combined proffered wages of the 18 additional beneficiaries with pending Forms I-140.

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[3] The receipt numbers for the 2013 filings are: and

[4] The receipt numbers for the 2014 filings (not including the Beneficiary) are: and (filed for the same individual), and

The record, however, does not document the proffered wages for all of the beneficiaries reflected in USCIS databases. Neither does it provide evidence of the actual wages, if any, that were paid to all of these individuals by the Petitioner in 2013 and 2014. Accordingly, we are unable to determine the Petitioner's ability to pay in either 2013 or 2014 based on its net income or net current assets. Further, without evidence of the proffered and actual wages for all of the beneficiaries for whom Form I-140 petitions were approved or pending in 2013 and 2014, we cannot conduct a meaningful analysis of the totality of the Petitioner's circumstances under *Matter of Sonegawa.* Accordingly, the record does not demonstrate the Petitioner's continuing ability to pay the proffered wage as of the May 3, 2013, priority date. For this reason as well, we will affirm the Director's denial of the visa petition and dismiss the appeal.

III. BENEFICIARY QUALIFICATIONS

In his April 24, 2015, decision, the Director indicated that he had found the record to establish the Beneficiary's qualifications for the offered position of software development engineer as of the visa petition's May 3, 2013, priority date. Our review of the record, however, has not reached this conclusion. For the reasons discussed below, we do not find sufficient evidence to establish that the Beneficiary has the experience required for classification as an advanced degree professional under section 203(b)(2) of the Act.

Part H. of the labor certification reflects the following requirements for the offered position:

H.4.	Education: Bachelor's.
H.4-B.	Major field of study: Computer Science, Engineering (Any), Math or related.
H.6.	Experience in job offered: 60 months.
H.7.	Alternate field of study: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in alternate occupation: Accepted.
H.10-A.	Length of experience in alternate occupation: 60 months.
H.10-B.	Acceptable alternate occupation: Computer/engineering professional.

The labor certification indicates that the Beneficiary holds a 2004 bachelor's degree in technology (electronics and communication engineering) from [redacted] (India) and has the following qualifying employment experience:

- Computer professional (programmer analyst), [redacted] from August 15, 2011, through the filing of the labor certification on May 3, 2013;
- Computer professional (software analyst), [redacted] from August 1, 2008, to June 21, 2011; and
- Computer Professional (software analyst), [redacted] from May 10, 2006, to July 18, 2008.

As required by the regulations at 8 C.F.R. §§ 204.5(g)(1), (l)(3)(ii)(A), the Petitioner has submitted experience letters in support of the above claims.

To establish the Beneficiary's prior employment with the Petitioner has submitted a statement from Sr. Manager (HR) who reports that the Beneficiary was employed full-time as a software analyst for the company from May 10, 2006, to July 18, 2008. further states that the Beneficiary was involved in "coding, analyzing, designing, developing and implementing a complete life cycle of application development environment, using technologies such as C#, ASP.NET, Java, J2EE, JSP, Servlets, XML, Oracle, VSS, .web services, .NET, Visual studio, Eclipse, Crystal reports, ArcGIS, ArcSDE, Log4j, UML, and FMW objects. also notes that the Beneficiary was responsible for analyzing/eliciting, elaborating, and documenting work performed; transferring the business requirements; and performing design sessions, and code analysis. The statement also notes that the Beneficiary was responsible for "requirements gathering, along with supervising [a] team member, by providing technical guidance."

The Beneficiary's employment with is supported by an April 9, 2014, statement from Manager Human Resources at who states that his company employed the Beneficiary as a software analyst from August 1, 2008, to June 21, 2011. He states that while employed, the Beneficiary was involved in "coding, analyzing, designing, developing and implementing a complete life cycle of application development to support business applications." statement also indicates that the Beneficiary was responsible for analyzing user requirements, supervising team members, performing testing, conducting technical support, and documenting the work performed. He lists the various tools and software used by the Beneficiary as including but not limited to: C#, ASP.NET, Java, J2EE, JSP, Servlets, XML, Oracle, VSS, .NET, Eclipse, Crystal reports, UNIX, Linux, ArcGIS, ArcSDE, Oracle SSO, Flex, Flash Builder, and FME objects.

As evidence of the Beneficiary's prior employment with the Petitioner has submitted a January 19, 2015, statement from its HR Manager. states that the Beneficiary worked for from August 15, 2011, to August 31, 2013, as a programmer analyst. states that while employed by the Beneficiary "analyzed[d], design[ed], develop[ed] and implement[ed] a complete life cycle of application development to support business applications." She also indicates that, while employed, the Beneficiary was required to provide technical support, conduct testing for efficiency, and document the work performed.

A. Progressive Experience in the Specialty

In the present case, the Petitioner is seeking classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the

> specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Here, we do not find the Beneficiary's descriptions of her prior employment or the experience letters submitted in support of her claims to establish that she has the five years of "progressive experience in the specialty" that, when considered with her baccalaureate degree in technology, would provide her with the equivalent of a master's degree. The Beneficiary's descriptions of her prior employment and the experience letters from and describe the same duties, the same levels of responsibility, and the same skill sets. They do not establish "employment experience that reveals progress, moves forward, and advances toward increasingly complex or responsible duties." *See* Memorandum from Michael D. Cronin, Acting Associate Commissioner for Programs, and William R. Yates, Deputy Executive Associate Commissioner, Office of Field Operations, U.S. Immigration and Naturalization Service, AD00-08, *Educational and Experience Requirements for Employment-Based Second Preference (EB-2) Immigrants* (March 20, 2000). Without evidence that the employment experience claimed by the Beneficiary involved advancing levels of responsibility and knowledge as a computer professional, we cannot conclude that the Beneficiary has the progressive experience required to establish the equivalent of a master's degree. *See* 8 C.F.R. § 204.5(k)(2). Accordingly, the Beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

B. Documentation of Employment Experience

Our review of the record on appeal has also found that the record does not reliably establish that the Beneficiary has the employment experience claimed in the labor certification.

The April 9, 2014, statement submitted to establish the Beneficiary's employment with is signed by Manager Human Resources at the firm, While states that is the name by which is now known, the record contains no documentary evidence that supports this assertion. This assertion, unsubstantiated by supporting evidence, is insufficient to satisfy the Petitioner's burden of proof. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)). The Petitioner must support assertions with relevant, probative, and credible evidence. *See Matter of Chawathe*, 25 I&N Dec. at 376. As a result, the statement from does not satisfy the regulation at 8 C.F.R. § 204.5(g)(1), which requires a petitioner to submit evidence of a beneficiary's experience in the form of letters from current or former employers or trainers. Accordingly, the record does not establish the Beneficiary's employment experience with during the period August 1, 2008, to June 21, 2011.

Further, the Beneficiary's claim to have been employed by during the period August 15, 2011, to August 31, 2013, and the statement signed by appear to be contradicted by the July 11, 2013, vendor letter signed by Corporate Financial Services,

As previously discussed, the statement from indicates that the Beneficiary started working for "through on September 19, 2011, as a Java developer and that she continued to work at as of the date of his statement. Accordingly, we do not find the record to establish that the Beneficiary was employed by during the claimed period. The Petitioner must resolve any material inconsistencies in the record by competent, objective evidence. Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

We also find the record to contain a 2011 Form W-2 for the Beneficiary that raises further questions regarding the Beneficiary's employment with as the employer reflected on the Form W-2 is not

To explain the Form W-2 issued to the Beneficiary by in 2011, the Petitioner has submitted a copy of a February 10, 2011, statement from PHR, HR Client Services, Human Resource Business Partner at and a copy of a contract between the Petitioner and which is not dated or signed.

In her statement, describes as a provider of human resources services, delivering and managing employee benefits, managing payroll processing, and tax filing, through a "co-employment" relationship. She indicates that is "the employer of record" on the Forms W-2 issued to its clients' employees, but that, under contract with retains "full responsibility at all times for its business, products and services," as well as the "right to control the means and manner of each employee's performance." further states that, although name is on the paychecks issued to employees, the funds come from

The explanation offered by for the Forms W-2 issued by does not, however, resolve relationship to the Beneficiary. The submitted contract between the Petitioner and contains language indicating that, during the period of the contract's validity, the Petitioner may have shared control of key aspects of its workers' employment with Although the contract's language (at Part I.B.1. and 2.) states that will retain control over its employees' day-to-day job duties and worksites, the contract also indicates (at Part I.B.4.) that and the "will each have a right to hire, discipline and terminate the Worksite Employees as to each one's employment relationship with [them]." Accordingly, we do not find the record to establish that, while the contract was in effect, the was the business entity with control over all aspects of the Beneficiary's employment and, therefore, his actual employer during that period.

In light of what appears to be the record's inconsistent documentation of the Beneficiary's employment from 2011 through July/August 2013, as well as unresolved questions relating to the Beneficiary's relationship with during 2011, we do not find the record to demonstrate that the Beneficiary was employed by as a programmer analyst during the period, August 15, 2011, to August 31, 2013, as claimed on the labor certification. Unresolved material

inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Without the experience claimed by the Beneficiary with [redacted] (2 years, 10 months, 21 days) and [redacted] (two years, 16 days), the record does not establish that the Beneficiary has the 60 months of qualifying experience required by the labor certification. Doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* For this reason as well, the record does not demonstrate that the Beneficiary is qualified for the offered position.

IV. CONCLUSION

On appeal, the Petitioner states that the evidence it has submitted for the record should be reviewed under the preponderance of evidence standard. We agree.

The petitioner must establish that it meets each eligibility requirement of the benefit sought by a preponderance of the evidence. *See Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010). In other words, the petitioner must show that what it claims is "more likely than not" or "probably" true. To determine whether the petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376; *Matter of E-M-*, 20 I&N Dec. 77 (Comm'r 1989). We consider the evidence both individually and in its totality. *Chawathe*, at 376.

Here, as discussed above, the record does not contain evidence of any existing or projected projects on which the Beneficiary could have been employed by the Petitioner as of the date it filed the labor certification, and, therefore, does not establish the offered position as a *bona fide* job offer. The record also lacks the financial documentation that would allow consideration of the Petitioner's ability to pay the proffered wages of the Beneficiary and the other individuals for whom it had pending Forms I-140 in 2013 and 2014. Finally, the record's documentation of the Beneficiary's employment experience does not establish the progressive nature of that employment and raises questions regarding the reliability of the experience she claimed on the labor certification. In light of these evidentiary deficits, the Petitioner has not proved that it is more likely than not that the visa petition should be approved.

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested beneficiary. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-T- Inc*, ID# 15512 (AAO June 13, 2016)